

vi  
scam

BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF HAWAII

ROBERT'S TOURS &  
TRANSPORTATION, INC.,  
a corporation,

Complainant,

vs.

E NOA CORPORATION,  
a corporation,

Respondent.

DOCKET NO. 98-0380

DECISION AND ORDER NO. 19913

Filed Dec. 18, 2002  
At 11:30 o'clock A.M.

Karen Higashi  
Chief Clerk of the Commission

DIV. OF CONSUMER ADVOCACY  
DEPT. OF COMMERCE AND  
CONSUMER AFFAIRS  
STATE OF HAWAII

2002 DEC 18 P 3:45

RECEIVED

ATTEST: A True Copy  
KAREN HIGASHI  
Chief Clerk, Public Utilities  
Commission, State of Hawaii.

K. Higashi

ROBERT'S TOURS &  
TRANSPORTATION, INC.,  
a corporation,  
  
Complainant,  
  
vs.  
  
E NOA CORPORATION,  
a corporation,  
  
Respondent.

Docket No. 98-0380  
  
Decision and Order No. 19913

On August 4, 2000, unable to stipulate to a proposed prehearing order, the parties filed individual proposed

prehearing orders. On August 10, 2000, the commission filed Prehearing Order No. 17967 (Prehearing Order). Pursuant to the Prehearing Order, the parties filed direct testimonies and exhibits, and conducted discovery through the issuance of information requests. The Prehearing Order was amended by the commission in Order No. 18310, filed on January 8, 2001,<sup>1</sup> and further amended by Order No. 18403, filed on March 5, 2002.

By Order No. 18403, the commission approved the parties' letter stipulation, filed on February 27, 2001: (1) waiving the complaint hearing; (2) establishing March 23, 2001 as the filing date of the final briefs; and (3) cancelled the March 8, 2001 hearing date.<sup>2</sup> On March 23, 2001, the parties filed their final written briefs.

## II.

### A.

Prehearing Order No. 1767 set forth the issues in this docket as follows:

1. Whether Respondent violated HRS §§ 271-8 and 271-12(a) by operating without the proper authority.

---

<sup>1</sup>Specifically, Order No. 18310 amended the complaint hearing date of the Prehearing Order. In all other respects, the Prehearing Order remained unchanged.

<sup>2</sup>In all other respects, the Prehearing Order remained unchanged.

2. Whether Respondent violated HRS § 271-20(a) by failing to provide safe equipment for the transportation of its passengers.
3. Whether Respondent violated HRS § 271-8.5(a) by advertising as a motor carrier of passengers without holding a valid certificate as to the classification so advertised.
4. Whether Respondent violated HRS § 271-21(b) by failing to observe tariff rules or charge authorized rates.
5. Whether Respondent violated HAR § 6-62-18(a) by not providing the commission with copies of its motor vehicle lease agreements.
6. Whether Respondent violated HRS § 271-27(a) by knowingly and willfully violating commission rules and regulations.

B.

**Whether Respondent violated HRS §§ 271-8 and 271-12(a) by operating without the proper authority.**

Complainant alleges violations of HRS §§ 271-8 and 271-12(a) by Respondent. HRS § 271-8 states, in relevant part:

[N]o person shall engage in the transportation of persons . . . for compensation or hire, by motor vehicle, . . . unless there is in force with respect to the person a certificate or permit issued by the public utilities commission authorizing the transportation.

Additionally, HRS § 271-12(a) requires that the commission issue a certificate of public convenience and necessity before a person can engage in the business of a common carrier by motor vehicle.

At the outset, we note that central to all of the allegations in this docket is Complainant's assertion that Respondent is exceeding the authority granted to it by the commission in Decision and Order No. 10722 by using its trolleys to operate irregular route and charter services.<sup>3</sup> Complainant argues that: (1) by its interpretation of the authority granted to Respondent in Decision and Order No. 10722, Respondent is excluded from providing irregular route and charter service; and (2) that the commission's acceptance of the formal complaint, following Complainant's four informal complaint letters to the commission confirm this interpretation.<sup>4</sup>

In response, Respondent asserts that it is operating within the authority granted by Decision and Order No. 10722, and that Complainant's failure to prevail, either in its motion for reconsideration of Decision and Order No. 10722, or in its failure to utilize its appeal remedy, pursuant to HRS § 271-33, makes the matter *res judicata*.<sup>5</sup> Moreover, Respondent contends that the commission's docketing of the formal complaint is not

---

<sup>3</sup>See Complainant's Final Brief at 8.

<sup>4</sup>*Id.* at 8-15.

<sup>5</sup>See Respondent's Final Brief at 13.

significant, meaning only that the complaint met the procedural requirements for the filing of a formal complaint.<sup>6</sup>

Decision and Order No. 10722 authorizes Respondent to operate as a common carrier of passengers by motor vehicle in the over-17 passenger classification on the island of Oahu, subject to two conditions. First, each vehicle, other than trolley-type vehicles used by Respondent under its operating authority, shall not exceed a passenger capacity of 30. Second, trolley-type vehicles used by Respondent on Oahu's freeway system, and at legal speeds exceeding 35 miles per hour shall be fully enclosed.<sup>7</sup>

In determining the validity of Complainant's allegations that Respondent is engaging in unauthorized irregular route activity, we turn first to HAR § 6-61-79(2). It provides, in relevant part, that regular route service "traverses over a fixed route with no deviation, with stops at fixed termini and on a time schedule, whether daily or hourly[.]" HAR § 6-61-79(2).

We find that the Waikele, Atlantis, and Aloha Tower Marketplace transfers (collectively, transfers), which Complainant cites as unauthorized irregular routes,<sup>8</sup> are run on

---

<sup>6</sup>See Respondent's Rebuttal Testimony at 8.

<sup>7</sup>Decision and Order No. 10722 also provides that each such trolley-type vehicle acquired by Respondent shall be inspected by the Department of Transportation and that Respondent shall comply with any of the department's safety requirements, however these conditions are not at issue in the instant complaint.

<sup>8</sup>See Complaint at 9-10.

regular schedules,<sup>9</sup> as defined in HAR § 6-61-79(2), and are not irregular routes. These transfers run on a daily basis, on fixed routes, stopping at fixed locations and at pre-determined times. Accordingly, we conclude that there is no basis for Complainant's allegation that Respondent is in violation of HRS §§ 271-8 and 271-12(a) by running an irregular route service, and, thus, such allegation should be dismissed.

Notwithstanding this conclusion, however, we are compelled to add, in light of the continual arguments set forth by Complainant throughout the pleadings in this docket,<sup>10</sup> that upon a thorough review of Decision and Order No. 10722, and of the positions put forth by the parties in this docket, we find that Respondent holds both regular and irregular route authority.

In its application in Docket No. 6444, Respondent requested that the commission **remove all vehicle and route restrictions in the over-17 passenger classification** (request for expanded authority).<sup>11</sup> At the time of the application, Respondent was authorized to operate in the 1-to-7 and 8-to-17 passenger

---

<sup>9</sup>Pursuant to HAR § 6-61-48, the commission takes official notice of those matters filed with the commission office, including the tariffs filed by Respondent for the transfers in question.

<sup>10</sup>For example, in Robert's Tours' Rebuttal Testimony of George Kahanu, Jr., filed on January 30, 2001, (Complainant's Rebuttal Testimony), Complainant incorrectly presumes that because Respondent was allowed intervention status in dockets where Complainant was applying for regular status authority, that Respondent did not also have irregular route authority. The grant of intervention status in an application for regular route authority does not necessarily mean that the intervenor does not also hold irregular route authority.

<sup>11</sup>See Decision and Order No. 10722 at 1.

classifications, without restrictions; and in the over-17 passenger classification, restricted to the carriage of passengers in trolley-type vehicles over a prescribed route.<sup>12</sup> Decision and Order No. 10722 **granted Respondent's request for expanded authority to operate in the over-17 passenger classification on the island of Oahu** in non-trolley-type vehicles, limited only by the two conditions, as noted, *supra*, wholly unrelated to the question of regular or irregular authority. Thus, we find and conclude, that pursuant to Decision and Order No. 10722, Respondent became the holder of both regular and irregular route authority in the 1-to-7, 8-to-17, and over-17 passenger classifications.

Moreover, we also find Complainant's allegation that Respondent is running an unauthorized charter service to be groundless. With regard to this matter, we look to Decision and Order No. 13923, filed on May 23, 1995, in Docket No. 7403 (Decision and Order No. 13923). Docket No. 7403 involved an application by Complainant to expand its operating authority to include regular route trolley service on the island of Oahu. In the context of denying Complainant's request for expansion of its authority, the commission acknowledged Respondent's charter trolley service.<sup>13, 14</sup>

---

<sup>12</sup>Id.

<sup>13</sup>See Decision and Order No. 13923 at 8.

<sup>14</sup>We note that Respondent was granted intervenor status in Docket No. 7403.



Accordingly, we also conclude that Complainant's allegation that Respondent is in violation of HRS §§ 271-8 and 271-12(a) by running an unauthorized charter service, is without merit, and should be dismissed.

C.

**Whether Respondent violated HRS § 271-20(a)  
by failing to provide safe equipment  
for the transportation of its passengers.**

Complainant asserts that "[i]n direct violation of its authority, Respondent has been operating open-sided or partially enclosed trolleys on highways where the legal speed limit exceeds 35 miles per hour", and, thus, concludes that Respondent is in violation of HRS § 271-20(a).<sup>15, 16</sup>

In response, Respondent describes Complainant's emphasis on the posted speed limit as erroneous, labeling the allegation improper and without merit.<sup>17</sup>

Upon review, we find Complainant's allegations to be groundless. Complainant has misconstrued the language of Decision and Order No. 10722.<sup>18</sup> As asserted by Respondent, the reference to "35 miles per hour" in Decision and Order No. 10722

---

<sup>15</sup>See Complaint at 6.

<sup>16</sup>HRS § 271-20(a) states, in relevant part, that it is a duty of every common carrier of passengers by motor carrier to provide safe and adequate service, equipment, and facilities for the transportation of passengers.

<sup>17</sup>Final Brief of Respondent at 18-19.

<sup>18</sup>Decision and Order No. 10722 provides, in relevant part, that Applicant's trolley-type vehicles, used "on Oahu's freeway system and at legal speeds exceeding 35 miles per hour shall be fully enclosed".

relates to the operating speed of Respondent's trolley-type vehicle, not the legal speed limit on a particular road. Moreover, no relevant or reliable evidence was submitted in support of Complainant's allegation. Accordingly, we find that Complainant has not sufficiently supported its claims that Respondent is in violation of Decision and Order No. 10722 or that Respondent violated HRS § 271-20(a).<sup>19</sup> Accordingly, we conclude that Complainant's allegation that Respondent has violated HRS § 271-20(a) by failing to provide safe equipment for the transportation of its passengers is without merit, and should be dismissed.

D.

**Whether Respondent violated HRS § 271-8.5(a)  
by advertising as a motor carrier of passengers  
without holding a valid certificate as  
to the classification so advertised.**

In support of the above stated allegation, Complainant contends that Respondent is in violation of HRS § 271-8.5(a) by advertising the operation of its trolley-type vehicles on routes

---

<sup>19</sup>In Complainant's Rebuttal Testimony at 3, Complainant argues that even if Respondent drives less than 35 miles per hour on a road where the legal speed limit exceeds 35 miles per hour, the speed of other vehicles would pose a hazard to the open trolley, and that if Respondent operated its open trolley-type vehicles below the legal speed limit, this too, could pose a risk. Without commenting on the substance of these arguments, we note that they are untimely. These arguments should have properly been made in Complainant's motion for reconsideration subsequent to Decision and Order No. 10722, and failing that, on appeal to the Hawaii Supreme Court, pursuant to HRS § 271-33.

where the legal speed limit is in excess of 35 miles an hour.<sup>20</sup> Consistent with our findings in Section C, *supra*, we find that this allegation is without merit.

Additionally, Complainant also claims that Respondent is advertising unauthorized transfer, irregular route, and charter services.<sup>21</sup> We also have previously addressed this issue of Respondent's authority, *supra*, and determined that Respondent was not in violation of HRS §§ 271-8 and 271-12(a), as alleged by Complainant. We, thus, find that, having settled the issue of Respondent's motor carrier authority, this allegation is also without merit. Accordingly, we conclude that Complainant's allegation that Respondent is in violation of HRS § 271-8.5 by advertising as a motor carrier of passengers without holding a valid certificate as to the classification so advertised should be dismissed.

E.

**Whether Respondent violated HRS § 271-21(b)  
by failing to observe tariff rules or  
charge authorized rates.**

Complainant alleges Respondent to be in violation of HRS § 271-21(b), given the fact that Respondent's tariff rates for transfers and charters published with the commission differ from its advertised rates.<sup>22</sup>

---

<sup>20</sup>See Complaint at 10-11.

<sup>21</sup>*Id.*

<sup>22</sup>See Complaint at 12-14.

Respondent counters that this allegation is based on a misunderstanding of the applicable law,<sup>23</sup> and in addition, that the commission has settled this issue. In Akamai Tours v. E Noa Corp. (Akamai Tours), the commission recognized that "advertised" fares differed from published tariff rates.<sup>24</sup> The commission found that the advertised fares originated from the lawful published tariff rates, with the addition of cost items such as admission fees and lunch.<sup>25</sup> The commission further found that the parties in Akamai Tours had "broad discretion" in adjusting the "non-regulated portion of their packaged tours" without modifying their tariff rates.<sup>26</sup>

We agree with Respondent. The commission regulates the transportation of persons or property. The commission does not regulate those non-transportation items of which Complainant protests, e.g., translators, meals, entry fees, etc., and consequently does not require those charges to be published in its tariffs. HRS § 271-21(a).

Complainant concedes that while it may be acceptable industry practice to attach additional non-transportation charges on to the disclosed transportation fee, those charges must be disclosed "up front".<sup>27</sup> We find this "requirement" to be

---

<sup>23</sup>See Respondent's Final Brief at 21.

<sup>24</sup>See Decision and Order No. 6184, filed on April 30, 1980, in Docket No. 3699.

<sup>25</sup>Id. at 18.

<sup>26</sup>Id.

<sup>27</sup>See Complainant's Final Written Brief at 16.

groundless.<sup>28</sup> There is no commission requirement that non-transportation charges must be disclosed up-front in advertisements. We find that Complainant has not supported its allegation with any credible evidence that Respondent is in violation of HRS § 271-21(b), and thus, conclude that the allegation should be dismissed.

F.

**Whether Respondent violated HAR § 6-62-18(a)  
by not providing the commission with  
copies of its motor vehicle lease agreements.**

Complainant claims that none of the lease agreements for Respondent's leased trolleys "appear to be on file with the commission",<sup>29</sup> in violation of HAR § 6-62-18(a), and speculates as to the reasons why Respondent would want to keep the contents of such leases from the public.<sup>30</sup>

Respondent admits an inadvertent failure to provide copies of leases for all of its motor vehicles in use, and states that it has, as of the date of this writing, remedied this by providing the commission with copies of all of its motor vehicle leases.<sup>31</sup> Complainant, however, calls into question Respondent's motivation and timing, arguing that while Respondent's initial failure to file all of its motor vehicle leases may have been

---

<sup>28</sup>See Decision and Order No. 6232, filed on June 9, 1980, in Docket No. 3699.

<sup>29</sup>See Complaint at 15.

<sup>30</sup>Id. at 16.

<sup>31</sup>E Noa's Direct Testimony at 7.

inadvertent, Respondent nevertheless failed to remedy the situation within a reasonable time.<sup>32</sup>

Upon a review of the record, we find that Respondent was not in compliance with HAR § 6-62-18(a) and, thus, conclude that Respondent was in violation of the filing requirements set forth in HAR § 6-62-18(a). However, we find that Respondent's compliance lapse was inadvertent,<sup>33</sup> thus, we do not find, nor do we conclude, that Respondent's violation is so egregious as to warrant all or any of the severe remedies proposed by Complainant.<sup>34</sup>

G.

**Whether Respondent violated HRS § 271-27(a)  
by knowingly and willfully violating  
commission rules and regulations.**

Complainant's final allegation is that Respondent violated HRS § 271-27(a) by knowingly and willfully violating the commission's rules and regulations. Complainant lists

---

<sup>32</sup>See Complainant's Final Written Brief at 19.

<sup>33</sup>Pursuant to HAR § 6-61-48, the commission takes official notice that Respondent has filed all of its motor vehicle leases with the commission.

<sup>34</sup>Complainant asked that the following sanctions be imposed upon Respondent: 1) a cease and desist order against Respondent, ordering it to immediately cease all of its alleged illegal activities; 2) revocation of Respondent's regular route authority for the island of Oahu; 3) civil sanctions, pursuant to HRS § 271-27(h); 4) a commission investigation into the management of Respondent; and 5) a grant to Complainant of regular route authority, without restriction, between the areas of Waikiki and Waikale, so that consumers can have an alternative to those services provided by Respondent. See Complaint at 19-20.

Respondent's continued operation of its trolley-type vehicles allegedly beyond the scope of its authority, and its failure to file lease agreements for vehicles it did not own, despite what it says was commission notice to Respondent about the filing requirement, as examples of knowing and willful violations.<sup>35</sup>

Respondent states simply that aside from its inadvertent failure to file certain of its motor vehicle leases, there were no violations of commission rules, regulations, or orders, nor of any provision of chapter 271, HRS, and thus, no willful or knowing behavior on its part.<sup>36</sup>

In light of our findings and conclusions, *supra*, that aside from Respondent's violation of the lease filing requirements in HAR § 6-62-18(a), which we found was inadvertent, there were no violations as alleged by Complainant. We, thus, find that there was no willful or knowing violation of commission rules or regulations, or of chapter 271, HRS, by Respondent, as alleged by Complainant. Accordingly, we conclude that Complainant's allegation that Respondent violated HRS § 271-27(a) is unfounded and should be dismissed.

#### H.

Finally, having disposed of each of Complainant's allegations in its November 12, 1998 formal complaint, we find that Complainant has failed to state a claim upon which relief can be granted. Except for Complainant's allegation that

---

<sup>35</sup>See Complaint at 16-18.

<sup>36</sup>See Respondent's Final Brief at 26.

Respondent failed to file its motor vehicle leases with the commission, each of its allegations has been found to be without merit. Moreover, the sole intent of the claims proffered by Complainant appears to be an exercise to frustrate Respondent's ability to do business. As such, we conclude that, with the exception of Complainant's allegation that Respondent violated HRS § 271-20(a), each of Complainant's charges against Respondent should be dismissed, with prejudice.

### III.

#### THE COMMISSION ORDERS:

1. The formal complaint, filed on November 12, 1998, is affirmed, in part, to the extent provided in subsection (e) below. In all other respects, the complaint is dismissed, with prejudice.

a. Complainant's allegation that Respondent violated HRS §§ 271-8 and 271-12(a) by operating without the proper authority from the commission is dismissed, with prejudice.

b. Complainant's allegation that Respondent violated HRS § 271-20(a) by failing to provide safe equipment for the transportation of its passengers is dismissed, with prejudice.

c. Complainant's allegation that Respondent violated HRS § 271-8.5(a) by advertising as a motor carrier of



passengers without holding a valid certificate as to the classification so advertised, is dismissed, with prejudice.

d. Complainant's allegation that Respondent violated HRS § 271-21(b) by failing to observe tariff rules or charge authorized rates, is dismissed, with prejudice.

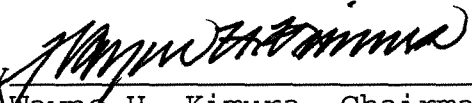
e. Respondent violated HAR § 6-62-18(a) by not timely providing the commission with copies of its motor vehicle lease agreements. However, no civil penalty will be assessed for the aforesaid violation. Respondent shall take all steps necessary to ensure that, in the future, all proper filings are made with the commission on a timely basis.

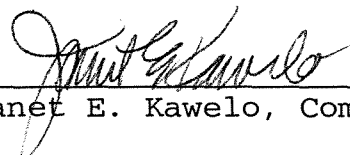
f. Complainant's allegation that Respondent violated HRS § 271-27(a) by knowingly and willfully violating commission rules and regulations is dismissed, with prejudice.

2. Complainant has failed to state a claim upon which relief by the commission can be granted.

DONE at Honolulu, Hawaii this 18th day of December,  
2002.

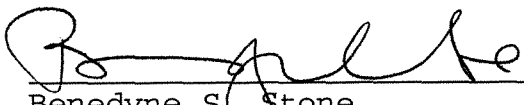
PUBLIC UTILITIES COMMISSION  
OF THE STATE OF HAWAII

By   
Wayne H. Kimura, Chairman

By   
Janet E. Kawelo, Commissioner

By \_\_\_\_\_ (RECUSED)  
Gregg J. Kinkley, Commissioner

APPROVED AS TO FORM:

  
Benedyne S. Stone  
Commission Counsel

98-0380.eh

CERTIFICATE OF SERVICE

I hereby certify that I have this date served a copy of the foregoing Decision and Order No. 19913 upon the following parties, by causing a copy hereof to be mailed, postage prepaid, and properly addressed to each such party.

DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS  
DIVISION OF CONSUMER ADVOCACY  
P. O. Box 541  
Honolulu, HI 96809

GEORGE KAHANU, JR.  
ROBERT'S TOURS & TRANSPORTATION, INC.  
680 Iwilei Road, Suite 700  
Honolulu, HI 96817

SANDRA Y. HOSHIDA, ESQ.  
SHAH J. BENTO, ESQ.  
HOSHIDA BENTO & MATSUNAGA  
Pauahi Tower, Suite 501  
1001 Bishop Street  
Honolulu, HI 96813

  
\_\_\_\_\_  
Karen Higashi

DATED: December 18, 2002